United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

615

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,876

UNITED STATES OF AMERICA,

Appellee

v.

DANIEL L. ROBINSON,

Appellant

No. 23,101

UNITED STATES OF AMERICA,

Appellee

v.

JOHN W. McCOY,

Appellant

Appeals from Judgments of Conviction of the United States District Court for the District of Columbia

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BRIEF OF APPELLANT DANIEL L. ROBINSON

United States Court of Appeals
for the District of Columbia Circuit

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Nathan J. Paulson
CLERK

Robert W. Coll
(Appointed by this Court)
1705 DeSales Street, N. W.
Washington, D. C. 20036
Attorney for Appellant
Daniel L. Robinson

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STATEMENT OF ISSUES*

1. In a prosecution for armed robbery where the single eyewitness who purported to make an identification, could identify only two of the three co-defendants (Robinson and McCoy), whether it was error for the Trial Court to refuse Robinson's timely motion for a trial separate from the defendant not identified (Coles) on grounds (seasonably stated) that Robinson and McCoy would inevitably challenge the credibility and reliability of the eyewitness, whereas Coles, inconsistently, would promote acceptance of her credibility and reliability and where, in fact, these contrary assertions were made throughout the trial.

2. Whether the in-court identification of Robinson by the eyewitness should have been suppressed because based upon an impermissibly suggestive out-of-court photographic identification, particularly when the eyewitness: (1) had been unable, when interviewed immediately following the crime, to give anything more than the most general description of any of the participants in the robbery; (2) had been unable to identify any of the participants when shown photographs of some 500 robbery suspects; (3) was able to make an identification only when the photographs were reduced to 14 (of 12 persons including the 3 defendants below); and (4) even then was unable to recall, in the case of Robinson, two distinguishing facial characteristics, i.e., a beard and a facial discoloration in the nature of a rash.

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*/ This case has not previously been before this Court.

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STATEMENT OF THE CASE

Daniel L. Robinson appeals from a judgment of conviction entered by the United States District Court for the District of Columbia on February 14, 1969. Following a four-day trial with two co-defendants (McCoy and Coles), Robinson was convicted by a

jury of five criminal offenses growing out of an armed robbery of the Watergate Branch of the Interstate Building Association in the District of Columbia on May 17, 1968: [1]

1. Entering a federally insured building association with intent to commit robbery therein, 18 U.S.C. Sec. 2113(a);

2. Two counts of taking money belonging to and in the custody of a federally insured building association, 18 U.S.C. Sec. 2113(a); and

3. Two counts of robbery, D. C. Code, Sec. 22-2901 (1967 Ed.).

On February 14, 1969, he was sentenced to serve 3-9 years to run consecutively with a 3-9 year sentence, imposed on the same date, for an unrelated charge of armed robbery to which he pled guilty (Transcript of pleadings, etc., filed May 29, 1969; Transcript in Criminal 572-68).

Robinson's two co-defendants were convicted of the same offenses (Tr. 956-57). When the jury was unable to reach a verdict on two additional counts charging assault with a dangerous weapon (D. C. Code Sec. 22502 (1967 Ed.)), these counts were dismissed upon motion of the prosecutor (Tr. 977), it having been previously agreed by all counsel, that the jury would be allowed to return verdicts on those

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[1] Tr. 956; Transcript of pleadings, etc., filed May 29, 1969.

counts upon which it could agree (Tr. 955).

A timely Notice of Appeal was filed by Robinson on February 14, 1969. By order of this Court of May 28, 1969, the appeals of Robinson and McCoy (No. 23,101), were consolidated for purposes of oral argument. [1/]

The testimony indicates that, shortly after 11 A.M. on May 17, 1968, four young, unmasked, Negro males, all of whom were armed, entered the Watergate Branch of the Interstate Building Association, loitered briefly near the entrance, and then approached the two tellers (the only persons on the prèmises at the time). (Tr. 214-16)[2/] Three of the four men approached the teller position of Mrs. Bircher, the witness who subsequently purported to identify Robinson and McCoy (Tr. 54, 215). The fourth man (subsequently identified by Mrs. Bircher as McCoy, Tr. 52-53), separated himself from the group, apparently examined an alcove, and then approached the teller position of Mrs. Simmons (who was not, subsequently able to make any identification, Tr. 47, 132-33) (Tr. 52-54, 215-217).

The tellers testified that the intruders demanded all of the money in their custody. Mrs. Bircher emphasized the "very clean, clean cut" appearance of the four intruders and her sense of disbelief that such nice appearing young men

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1/ Defendant Coles had also appealed his conviction (Case No. 23112) but on September 9, 1969 he filed a motion to withdraw his appeal. This motion was granted October 28, 1969.

2/ A fourth suspect in the case was prosecuted as a juvenile.

could be doing such a thing (Tr. 60-61). She was not able to recall, subsequently, that Robinson (a) had a beard and (b) had a noticeable skin rash which discolored his face and neck (Tr. 34, 62). The tellers testified that the four intruders calmly left the banking office, approximately four or five minutes after entering (Tr. 50, 275) with the sum of $1,546.20 (Tr. 219, 272).

Mrs. Simmons and Mrs. Bircher each testified that they were "very slow" leaving the banking office and in approaching the get-away car (Tr. 225, 276). A man parking his automobile on the street outside of the building association office, however, observed four Negro males leave the Watergate office building quite hurriedly, quickly enter an automobile and drive off at a high rate of speed (Tr. 407). Because of their haste, he noted the license number of the car in which they departed (Tr. 407).

On the afternoon of the robbery, the two tellers were taken to police headquarters where they viewed photograph albums containing approximately 500 color, Polaroid snapshots of persons previously arrested on robbery charges (Tr. 358). These are photos taken by Robbery Squad officers and are not the regular police "mug shots" (Tr. 358). Neither teller was able to select any photograph as depicting any of the robbers (Tr. 141). Police officials testified that, since various of

these photos were continuously absent from the albums while being used by individual detectives, it was impossible at the time of trial to determine whether or not pictures of any of the defendants below were in the photograph albums at the time the tellers viewed them (Tr. 160-161, 184). However, police testimony indicates that Robinson should have been photographed by Robbery Squad detectives at the time of his March 6, 1968 arrest and that his photograph should have been placed in these albums (Tr. 153-154). Defendant Robinson confirmed that Robbery Squad detectives took a Polaroid photograph of him after his March 1968 arrest (Tr. 188).

Acting on an informant's tip, law officers on the afternoon of the robbery, arrested five persons (including Robinson and Coles) as suspects in the Watergate robbery (Transcript of September 27, 1968 Hearing at pp. 22-26). These suspects were arrested at the same time in a men's clothing store and a portion of the stolen money was recovered from Coles' wallet which was then in the possession of one George Palmer (Tr. 574).[1/] Later that same day, individual color, Polaroid snapshots were taken of these suspects in the offices of the Metropolitan Police Robbery Squad. McCoy was arrested during the evening of the same day and similarly photographed. In addition, two group photographs were taken of the defendants on May 17, 1968 (Tr. 358).

1/ Palmer was not charged in connection with the robbery.

On May 21, 1968, these individual Polaroid snapshots of the six suspects, along with individual Polaroid snapshots of six other subjects and two group Polaroid photos of the suspects (a total of 14 photos) were shown to the two tellers (Tr. 103, 110).

Mrs. Simmons was unable to identify any of the persons in the photographs displayed (Tr. 132-133). Mrs. Bircher positively identified three of the subjects in the photographs -- Robinson, McCoy and a juvenile (Tr. 126-127). She could not positively identify Coles (Tr. 127) although she picked him and a fifth man as "look alikes." The photographs of each of the five subjects she thus identified included a prominently displayed calendar bearing the date, May 17, 1968 -- the date on which the building association was robbed (Tr. 345-346). The only individual photographs bearing the date of May 17, 1968 were photos of the six men arrested in connection with this case (Tr. 345, 346). The two group photographs also displayed the calendar bearing the same date (See Exhibit II and IK below). Only one of the other photographs displayed a calendar and it bore the date April 17, 1968 (Tr. 147). Three of the six arrested men were depicted in the group photographs (Tr. 344-345). Two other photographs (Ex. Nos. 1H, 1J) were of men wearing hats (Tr. 346). Of these photos, one depicted a person who appeared substantially

older than any of the men arrested in connection with this offense (Tr. 346).

Prior to the preliminary hearing, it had become apparent to defense counsel that since two of the three co-defendants had been identified by Mrs. Bircher while the third had not, defense counsel would be required to assert inconsistent positions during the course of the trial, as to the reliability of Mrs. Bircher's powers of observation and recollection. Accordingly, counsel for Robinson and McCoy requested a severance of their trials from that of Coles and Coles made a similar motion (Tr. 44-45, 201, 244). The District Court denied the several such motions made by the three defense counsel during both the preliminary hearing and the trial (Tr. 45, 201 and 244).

Prior to the trial the District Court held a "Simmons hearing" on the motions of defense counsel to suppress Mrs. Bircher's probable in-court identification of Robinson and McCoy (Tr. 12).

During the hearing it was brought out that during the robbery, during her identification of the photographs and during her court appearances, Mrs. Bircher was unusually nervous (Tr. 19, 60, 359). The testimony also indicated that the descriptions of the robbers initially provided to police by Mrs. Bircher and repeated by her in Court, did not accurately correspond to the appearance of Robinson in that she described all of the subjects as being "very clean, clean shaven" and as not

having any scars or identifying marks or features (Tr. 60). Even on cross-examination, she was unable to recall clearly that any of the robbers was bearded or had a substantial rash on his face and neck (Tr. 34, 61). In fact, the Polaroid photo taken of Robinson by Robbery Squad detectives on the day of his arrest shows both a beard and discoloration of his face and neck that are discernible in the photos, even though they are of only snapshot quality (Exhibit 1C below).

At the conclusion of the "Simmons hearing", the Court below refused to suppress Mrs. Bircher's probable in-court identification of Robinson and McCoy (Tr. 66) and affirmed that ruling later (Tr. 244).

ARGUMENT

I.

Defendant Robinson's Motions for Severance of His Trial From that of His Co-Defendant Mark Coles Should Have Been Granted by the Trial Court.

A. While Disposition of Motions to Sever the Trials of Co-Defendants Who Have Been Jointly Indicted is Normally Within Sound Discretion of the Trial Court, in Exercising that Discretion, Consideration Must be Given to Fundamental and Important Rights of the Accused.

Robinson submits that the Trial Court here committed reversible error by refusing to grant his request for severance of his trial from that of his co-defendant, Mark Coles.

The accepted rule is that it is normally within the discretion of a trial court to determine whether or not the

trials of particular criminal defendants should be consolidated.[1/] However, under Rule 14, the trial court must, upon a proper request by one or more of the co-defendants whose trials are consolidated, grant severance if it clearly appears, in light of all the circumstances, sound judicial discretion and common sense, that the defendants will not receive a fair trial if tried together.[2/]

As this Court has noted in the context of joinder of offenses:

> "The term 'prejudice' as used in Rule 14 is not necessarily as great as the prejudice an appellate court must find for reversible error. Its meaning is not subject to rigid definition, and depends to a considerable extent on the perception of the district judge. Prejudice is not limited to a showing of irrevocable damage, certain to occur, and impossible to overcome. Prejudice may also lie in shouldering substantial risk that a situation will not be remedied."[3/]

The principal purpose of consolidation of trials is to promote economy and efficiency in judicial administration: To avoid repetition of testimony, wasteful use of court time and facilities.

1/ Rule 14, Fed. Rules Crim. Proc.
Daley v. United States, 231 F. 2d 123 (1st Cir. 1956).

2/ Rule 14, Fed. Rules Crim. Proc.
Baker v. United States, 329 F. 2d 786, (10th Cir. 1964), cert. den., 379 U.S. 853 (1964).

3/ Garris v. United States, U.S. App. D.C. ___, ___ F. 2d ___ (No. 21,572; April 25, 1969).

However, these legitimate areas of judicial concern do not represent the single touchstone for determination of whether severance or consolidation is the appropriate procedure:

> "The gain in speed and economy of trial which results from the consolidation of criminal cases is often offset by the disadvantage at which the defendants are placed by the consolidation. The trial court has the obligation of safeguarding the rights not only of the government, but also of the individual accused, and must see to it that such rights are not jeopardized by the consolidation for trial of numerous cases." 1/

B. In This Case No Significant Economy or Efficiency Was Achieved by Insisting Upon Consolidation.

The trial court would not have here imposed either an onerous or expensive burden on the government, the witnesses or the judicial process by granting the motions for severance. While we readily concede that consolidation serves a useful and valuable purpose in given circumstances (where there are numerous defendants accused of crimes arising from complex circumstances; where there are numerous witnesses all of whom must testify concerning the same events relevant to each defendant; where the trial is likely to be unusually lengthy) this was not the sort of case which necessitated consolidation or where consolidation, in fact, achieved significant

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1/ Schmeller v. United States, 143 F. 2d 544, 550 (6th Cir. 1944).

economy or efficiency in the trial process. In reviewing the trial court's ruling in this regard, this Court should weigh the absence of any real necessity for consolidation against the prejudice to the defendant which arose from that consolidation.

The fact is, in the case of Robinson, there was only one significant witness -- Mrs. Bircher, the teller who purported to identify him as one of the robbers. The government had no tangible evidence linking Robinson with the crime (such as the fingerprint in the case of McCoy and the money wrapper in the case of Coles Tr. 419-420; Tr. 574-576, 577-578) and therefore police testimony, relevant to Robinson, would have been quite abbreviated. The record shows that Robinson could have been tried very quickly and readily separately from Coles. Such a procedure would have imposed relatively little additional burden upon the Court or the prosecution and could have been accomplished at practically no inconvenience to the witnesses.

Moreover, it should be borne in mind in assessing, realistically, what economy was achieved by the consolidation, that Robinson and McCoy did not insist that they necessarily be tried separately -- only that the two of them be tried separately from Coles who had not been identified by Mrs. Bircher. The defendants were not therefore asking for three trials, only for two (Tr. 211).

C. In Weighing the Insignificant Economy Arising from Consolidation Against the Prejudice Which was Visited Upon Robinson from that Consolidation, the Court Should Conclude that There was an Abuse of Discretion in the Trial Court's Refusal to Grant Robinson's Motion for Severance.

It will be recalled that Mrs. Bircher purported to identify only Robinson and McCoy. She could not make an identification of Coles as one of the robbers and the second teller (Mrs. Simmons) could make no identification at all.

Particularly in the case of Robinson, Mrs. Bircher's identification was the key to his conviction, if conviction there was to be: There was no tangible evidence otherwise linking Robinson with the crime; no fingerprints; no money; and no other identification. Inevitably, therefore, the strategy of Robinson's defense below was to challenge the reliability of Mrs. Bircher's identification; her opportunity to observe; the validity of her recollection. In fact, there was some tangible reason to doubt the validity of her identification since she could recall neither a beard nor a face discoloration (arising from a rash) which Robinson unquestionably had on May 17, 1968 when he allegedly confronted Mrs. Bircher at the Watergate Branch.

Throughout the trial, defense counsel below ably and effectively made those points available to him which tended to impeach the reliability of Mrs. Bircher's identification. The same strategy was followed by counsel for McCoy. Unfortunately, counsel for Coles was in a different position. Since

Mrs. Bircher could not identify his client (although he was purportedly standing in exactly the same position in relation to Mrs. Bircher as was Robinson), he necessarily tended to try to persuade the jury that Mrs. Bircher's opportunity to observe was adequate; that she had evidenced a significant ability to recall in identifying Robinson and McCoy; and therefore, her failure to identify Coles should be taken to mean that he was not there.

Thus, as the result of the consolidation, the defendants were required to "fight among themselves" and to urge continuously contrary positions as to the reliability of the government's key witness (Tr. 242-244).

We realize, of course, that in a separate trial of Robinson and McCoy, the prosecuting attorney would have been in a position to make the same contentions relative to Mrs. Bircher as did Coles' attorney in the consolidated trial. We insist that this is not the same thing. A jury, confronted with the consistent arguments of the defense, against the contrary arguments of the prosecution, sees the issue fairly joined and makes its judgments under normal and fair circumstances of adversary proceedings. But when the jury sees that the defendants are against each other; when it sees that one of the defendants is contending for a prosecution point, relative to a critical witness, the circumstance inevitably dilutes the defense of all of the accused. The jury will have a tendency

to reject the entirety of defense contentions (as apparently it here did) and conclude: "A plague on all their houses."

This prejudice was wholly unnecessary in the circumstances of the instant case. We are simply not dealing with a case either of the complexity or of the length which would make considerations of judicial efficiency and economy overriding. We are, at the same time, dealing with a case where consolidation produced discernible prejudice to the accused. Weighing these relevant considerations, it is respectfully submitted that this Court should reverse Robinson's conviction and remand the case to the District Court with instructions that he either be tried separately or in consolidation only with McCoy.

II.

Defendant Robinson's Motion to Suppress the In-Court Identification of Him by Mrs. Bircher Should Have Been Granted by the Trial Court.

A. An Eye Witness Identification Should be Suppressed When Based Upon a Photographic Identification Procedure so Suggestive as to Raise a Substantial Possibility that any Subsequent Identification Would be Based Upon the Witness' Mental Image of the Photograph Rather than of the Person Who Committed the Crime.

It was readily apparent when the police sought to obtain the photographic identification of Robinson that, in the circumstances of this case, any photographic or in-court identification would be critically important. The police did not then have, and have never subsequently obtained, any independent evidence against Robinson. Thus, an eyewitness identification

as to him was absolutely essential to a successful prosecution.

Despite the readily apparent significance of obtaining a reliable eyewitness identification of Robinson, the procedure used by the police to obtain the identification was impermissibly suggestive.

As has been recognized by the Supreme Court, the out-of-court photographic identification procedure used in this case -- and widely used throughout the country -- has a tendency to impress upon the mind of the witnesses the image of one or more of the persons depicted in the photographs displayed at the time of the identification, rather than the image of the person actually seen at the time of the crime.[1/]

B. In Determining Whether or not to Permit an In-Court Identification, the Court Must Determine Whether the Identification Procedure Used Was So Conducive to Mistake as to Amount to a Deprivation of Due Process.

The task of the trial court in determining whether to permit an in-court identification is to ascertain whether, in light of all the circumstances, the identification procedure employed by the police was so conducive to mistake as to

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1/ Simmons v. United States, 390 U.S. 377 (1968), the Court stated at pp. 383-384:

> "Even if the police subsequently follow the most correct photographic identification procedure and show [the witness] the pictures of a number of individuals without indicating whom they suspect, there is some danger that the witness may make an incorrect identification.... Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than the person actually seen, reducing the trustworthiness of subsequent line-up or courtroom identification."

amount to a deprivation of due process.[1/] In Simmons v. United States, supra, the Court described the critical question as whether the photographic identification procedure employed was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Defendant Robinson submits that, in light of all the circumstances and the alternatives available to the police, the identification procedure used in this case was "impermissibly suggestive."

C. The Identification Technique Employed by the Police in this Case Needlessly Involved a Substantial Risk of Misidentification by the Witness.

On May 21, 1968, representatives of the Federal Bureau of Investigation and the Metropolitan Police Department showed fourteen color, Polaroid snapshots (of twelve different persons) to Mrs. Bircher who then identified Defendant Robinson as one of the persons who allegedly participated in the robbery. At the time the law officers obtained this photographic identification, all the suspects in this case were in custody and had, in fact, been in custody since May 17, the date of the crime. Under these circumstances, the photographic identification procedure was unnecessary except as a convenience to the law officers. The ends of justice would have been better served had the police arranged for the witnesses in this case to view

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1/ See, for example, Stovall v. Denno, 388 U.S. 293 (1967).

a line-up of the suspects.[1/]

Previously, on May 17, 1968, shortly after the robbery of the building association office, the witnesses were taken to police headquarters where they viewed albums of color, Polaroid snapshots taken by Robbery Squad detectives of persons arrested in connection with other robberies in the District of Columbia. These albums contained approximately 500 photographs and may have included a photograph of Robinson taken by Robbery Squad detectives at the time of his arrest earlier in 1968, in connection with another robbery. It is impossible to say, on this record, whether or not a photo of Robinson was in the albums at the time they were examined by the witnesses since, at any moment in time, a substantial number of the photos are in the possession of individual detectives rather than in the albums. The photos are continuously used by the detectives in their efforts to obtain photographic identifications such as those obtained from the witnesses in this case on May 21, 1968. Because no accurate record is maintained as to which photographs are present in the albums at a particular time, it was impossible for the police to determine at the time of trial whether or not the witnesses had seen Robinson's picture in the albums when they

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1/ It should be noted in this regard that during the preliminary hearing a motion was made on behalf of Defendant Robinson requesting that the trial court direct the police department to hold a line-up to determine whether Mrs. Bircher could then identify Defendant Robinson. The Court denied this motion (Transcript of September 27, 1968 Hearing at page 44).

reviewed them on May 17, 1968. In any event, on the day of the robbery, the witnesses were unable to identify any of the persons pictured in the albums as being the robbers.

However, when Mrs. Bircher was shown either 14 or 15 color, Polaroid photos of the type contained in these albums on May 21, 1968, she selected three photographs, including Robinson's as being persons who participated in the robbery. She selected two additional photographs as being of persons who resembled two of the robbers. The other two witnesses were unable to identify any photographs as being of individuals participating in the robbery. Thus, Mrs. Bircher may well have been recalling a photograph from the album of 500 when she purported to identify Robinson from the 14 - 15 photos she was subsequently shown. The problem in this regard and the possible error was the result solely of government procedures and omissions which were entirely unnecessary to their obtaining a proper -- and fair -- identification if one was to be made.

D. From the Record Below, it is Apparent that Several Substantial Inconsistencies in Mrs. Bircher's Testimony Indicate that Defendant Robinson is not Raising a Contrived Procedural Point. Rather, he Seeks Relief from a Procedural Error Which the Record Suggests May Well Have Resulted in his Erroneous Conviction.

As the record clearly indicates, even the superficial description which Mrs. Bircher provided police immediately after the crime, and her affirmation of these descriptions in Court,

do not coincide with Robinson's appearance at the time of the robbery. In fact, even immediately after the crime, none of the three witnesses were able to provide law officers with an adequate description of the persons who participated in the bank robbery. Because of the sketchiness of the descriptions provided to police immediately after the robbery, the law officers testified that no attempt was made to correlate the descriptions provided them by the witnesses with the appearance of any of the persons arrested in connection with the crime (Tr. 121-122).

The record is replete with descriptions of the robbers and their actions which are either inconsistent with Robinson's actual appearance or are controverted by the testimony of other witnesses. First, Mrs. Bircher testified that the four robbers left the building association office "slowly" while the witness who watched them emerge from the building indicates that they left quite hurriedly (Tr. 225, 407).

Second, in her testimony in court, Mrs. Bircher described the robbers as "very clean, clean cut" youths (Tr. 60) who appeared quite incongruous in their role as robbers. Even on cross-examination when she had before her the color, Polaroid shapshot of Robinson which had served as the basis of her identification of him on May 21, 1968, Mrs. Bircher was unable to recall that any of the robbers bore an easily discernible beard or a discoloration in the nature of a rash on his face and neck as was true in Robinson's case (Tr. 34, 60). These

color, Polaroid photos, which are of essentially snapshot quality, were taken by police officers on the date of the robbery and show that Robinson then bore both a beard and a rash.[1/] Third, although Mrs. Bircher testified that Robinson had stood, unmasked, within reach of her for a period of time adequate for her to positively identify him (Tr. 20, 217), Mrs. Bircher was confused as to whether the person before her was wearing sunglasses or ordinary prescription glasses (Tr. 23, 25, 45, 59).[2/]

Fourth, despite her alleged proximity to Robinson for a considerable period (Tr. 19-20) Mrs. Bircher was unable to recall his alleged position before her relative to the other two robbers (Tr. 43).

Two additional facts give these inconsistencies added significance. First, the record clearly indicates that Mrs. Bircher was unusually nervous during her courtroom testimony (Tr. 359). In addition, she testified that she was quite nervous at the time of the crime and again when she was shown photographs of the individuals whom police suspected of committing the crime (Tr. 19, 60).

1/ In this connection, counsel for Robinson understands that the facial rash which Mrs. Bircher was unable to recall -- either immediately after the robbery or at trial -- was sufficiently prominent to be a principal basis of the identification of Robinson by the eyewitness to another robbery to which he has pled guilty. (The robbery to which Robinson pled guilty occurred in March, 1968.)

2/ Robinson does usually wear ordinary prescription glasses and these are apparent in the photo Mrs. Bircher identified.

Second, the record discloses that Robinson's two co-defendants and those of the witnesses who were queried on the point, indicated -- in both their initial statements to the police and their testimony at trial -- that Robinson's co-defendants knew him only by sight or only quite casually (Tr. 627, 697, 744, 761, 786). His co-defendants further indicated that his presence in Surrey's Men's Store at the time of their arrest was coincidental (Tr. 761).

CONCLUSION

For the reasons outlined above, Robinson's conviction should be reversed and the District Court instructed to enter a judgment of acquittal. Without any eyewitness identification of Robinson as a participant in the robbery, there is no evidence to support a conviction. But even if this Court should reject Robinson's contention as to the impropriety of the eyewitness identification, he is still entitled to relief in the form of a reversal and a remand for a new trial in view of the trial court's erroneous denial of his motion for severance from the trial of Defendant Coles.

Respectfully submitted,

Robert W. Coll
(Appointed by this Court)
1705 DeSales Street, N. W.
Washington, D. C. 20036
Attorney for Appellant
Daniel L. Robinson

November 17, 1969

CERTIFICATE OF SERVICE

I, Linda Smith, do hereby certify that I have, this 17th day of November, 1969, sent by regular United States mail, postage prepaid, copies of the foregoing "Brief of Appellant Daniel L. Robinson" to the following:

George A. Fisher, Esq.
Union Trust Building
740 15th Street, N. W.
Washington, D. C. 20005
Counsel for John W. McCoy, Appellant

John Terry, Esq.
Assistant U. S. Attorney
Room 3818
U. S. Court House
Washington, D. C.
Counsel for United States of America

Linda Smith

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,876

UNITED STATES OF AMERICA,

Appellee

v.

DANIEL L. ROBINSON,

Appellant

Appeal from Judgment of Conviction of the United States District Court for the District of Columbia

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REPLY BRIEF FOR APPELLANT DANIEL L. ROBINSON

United States Court of Appeals
for the District of Columbia Circuit

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Nathan J. Paulson
CLERK

Robert W. Coll
(Appointed by this Court)
1705 DeSales Street, N. W.
Washington, D. C. 20036
Attorney for Appellant
Daniel L. Robinson

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I.

Appellant Robinson's Motions for Severance of His Trial From That of Co-Defendant Mark Coles Should Have Been Granted by the Trial Court.

Predictably, the Government's brief attempts to minimize the possibility of prejudice from the consolidation of Appellant's trial with that of Mark Coles.

In attempting to establish the reasonableness of the trial judge's denial of the Appellant's repeated motions for severance below, the government relies on three superficially analogous cases which are not controlling in the circumstances

of this case. Daley v. United States, 231 F. 2d 123, (1st Cir., 1956) includes language to the effect that severance will not be granted absent "substantial prejudice to the right of the defendants to a fair trial." The government's reliance on this case is misplaced since, in contrast to the present case, the defendants there did not request severance of their trials below.

The Government next cites Bruton v. United States, 391 U. S. 123 (1968) as a case following the Daley doctrine. However, in relying on Footnote 6 in the Bruton case (Br., p. 4), the Government neglects adequately to explain the context of that footnote. Significantly, Footnote 6, appearing at page 131 of the Bruton decision refers to this sentence:

> "Rule 14 authorizes a severance where it appears that a defendant might be prejudiced by a joint trial." 1/

Finally, the Government relies upon (Br., p. 4) Lutwak v. United States, 344 U. S. 604 (1953) which states that:

> "A defendant is entitled to a fair trial but not a perfect one."

Again, the context in which this single sentence appears is of critical importance. Following is the pertinent text which shows the case is not analogous:

> "In our search of this record, we have found only one instance where a declaration made after the conspiracy had ended was admitted against all of the alleged conspirators even though not present when the declaration was made. Was the admission of this one item of hearsay evidence sufficient to reverse this case?

1/ Emphasis supplied throughout unless otherwise indicated.

"We think not. In view of the fact that this record fairly shrieks the guilt of the parties, we cannot conceive how this one admission could have possibly influenced this jury to reach an improper verdict. A defendant is entitled to a fair trial but not a perfect one. This is a proper case of the applicationof Rule 52 (A) of the Federal Rules of Criminal Procedure. We hold that the error was harmless. [footnotes omitted.]"

The Government concludes (Br., p. 4):

"In this case the defendants did not assert contradictory defenses....

"The only possibly conflicting situation arose when Mrs. Bircher identified appellant and McCoy, but not Coles, as two of the four robbers.

"In our view, Mrs. Bircher's failure to identify Coles and Coles' attorney's method of taking advantage of this fact did not constitute sufficient prejudice to require severance."

The credibility and reliability of Mrs. Bircher's testimonial identification was the very essence of Appellant's defense. It should not have been diluted and prejudiced when any economy of time or judicial process was illusory and unnecessary.

The point we re-emphasize is that, under Rule 14, when prejudice from joinder is apparent, a refusal to sever should be justified by accomplishment of the fundamental purposes of joinder, namely, necessary efficiency in trial proceedings. Otherwise, the refusal is arbitrary.

Here, a separate trial could have been accomplished easily and quickly. The refusal, therefore, to grant such a separate trial when prejudice was likely to occur through conflicting defense contentions over Mrs. Bircher's credibility (and did occur), is an abuse of discretion.

II.

Appellant Robinson's Motion to Suppress the In-Court Identification of Him by Mrs. Bircher Should Have Been Granted by the Trial Court

The government correctly points out that the identification procedure employed by the police in this case was in many ways above reproach. However, the fact that the procedure followed was much less suggestive than it might have been does not justify the procedure followed. The record clearly shows that the "slew" of photographs (Br. p.5) (actually 14 or 15 in number) displayed to the witnesses was so composed as to highlight the defendants - including Appellant:

1) Appellant and the others arrested in this case appeared in the array of photos more than once and were the only persons to appear in both individual and group photos.

2) Each of the photos of those arrested in this case included a calendar immediately behind the individual's head prominently displaying the date on which the building association was robbed.

(3) The appearances of several of the individuals included in the array of photographs shown to the witnesses did not at all resemble the appearances of the suspects then in custody.

(4) In contrast to the situation in Simmons where photos were displayed to witnesses the day following the robbery, photos were shown to the witnesses in this case four days after the robbery.

5) There is a substantial possibility that the witnesses saw a picture of Appellant in an album of some 500 photographs which was displayed to them shortly after the robbery. If Appellant's photo was, in fact, in this group, it - rather than Mrs. Bircher's recollection of the persons actually participating in the robbery - may well have provided the basis of her identification.

At several points the record clearly discloses that these and possibly other suggestive aspects of the identification procedure may well have resulted in Mrs. Bircher's identification of Appellant:

1) Mrs. Bircher was exceptionally nervous during the Simmons hearing and, by her own testimony, was similarly frightened and nervous during the robbery. (Tr. 19, 60, 359)

2) Although the other teller had the same opportunity to study the participants, only Mrs. Bircher was able to identify any suspects. (Tr. 47, 132-33)

3) Neither Mrs. Bircher nor either of the other witnesses were able to provide police an even remotely complete description of the intruders immediately after the robbery. (Tr. 121-122, Tr. of Motions Hearing p. 17-18)

4) The witnesses were unable to agree upon where the defendants allegedly stood during the robbery and whether they ran or walked calmly from the building association office. (Tr. 43, 225, 276, 407).

5) Even under cross examination, Mrs. Bircher was unable to recall which, if any, of the intruders:

   a) wore trench coats (Tr. 34, 230)
   b) had beards (as appellant did, Exhibit 1-c) or were "very clean, clean cut" (Tr. 60-61)

c) wore glasses or sunglasses (Tr. 20, 23, 59)
d) had a severe white rash on his face and neck (as appellant did) (Tr. 34,60)

As this court recognized in Mason v. United States, 414 F. 2d 1176 (1969), and as the Supreme Court recognized in Simmons v. United States, 390 U.S. 377 (1968) the reasonableness of the identification procedure employed by police officials depends, to some extent, upon the circumstances under which the identification is made. In Mason the court recognized that, as in this case, there was no urgent need for immediate action which prevented the police from taking special precautions to assure that the identification procedure employed was not unduly suggestive. The ease with which such precautions could have been taken in this case was particularly clear since all of the suspects were in police custody prior to the witnesses being shown their photographs.

Further, the police were here aware of the critical importance of obtaining a reliable identification of Appellant since they then had no tangible or independent evidence against him and had no prospect of obtaining such evidence. In these circumstances the identification procedure employed by the police department was both unreasonably and unnecessarily suggestive. Consequently, the trial judge's

refusal to suppress Mrs. Bircher's in-court identification of Appellant constitutes reversible error.

CONCLUSION

For the reasons outlined above, Robinson's conviction should be reversed and the District Court instructed to enter a judgment of acquittal. Without any eyewitness identification of Robinson as a participant in the robbery, there is no evidence to support a conviction. But even if this Court should reject Robinson's contention as to the impropriety of the eyewitness identification, he is still entitled to relief in the form of a reversal and a remand for a new trial in view of the trial court's erroneous denial of his motion for severance from the trial of Defendant Coles.

Respectfully submitted,

Robert W. Coll

(Appointed by this Court)
1705 DeSales Street, N.W.
Washington, D. C. 20036

Attorney for Appellant
Daniel L. Robinson

June 5, 1970

CERTIFICATE OF SERVICE

I, Robert W. Coll, do hereby certify that I have, this 5th day of June, 1970, sent by regular United States mail, postage prepaid, copies of the foregoing to the following:

John Terry, Esq.
Assistant U. S. Attorney
Room 3818
U. S. Court House
Washington, D. C.
Counsel for United States of America

Robert W. Coll